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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH ATKINSON, Defendant and Appellant.	A097376 (Contra Costa County Super. Ct. No. 59906389)

Defendant Joseph Atkinson was sentenced to 50 years to life for the murder of Paul Cook. He contends the trial court abused its discretion by denying his motion for new trial. In that motion, defendant argued that newly discovered evidence showed that Cook was killed by Larry Russell; that defendant's trial counsel was ineffective for not properly investigating and presenting evidence of Russell's guilt; and that trial counsel was ineffective for failing to investigate and present evidence of certain matters which allegedly could have impeached the key prosecution witness. We affirm because the evidence in support of the new trial motion was neither newly discovered nor credible, and because trial counsel was not ineffective for either reason advanced by defendant.

I. FACTS

Under applicable standards of appellate review, we must view the facts in the light most favorable to the judgment of conviction, and presume in support of the judgment the existence of every fact which the jury could reasonably find from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

The People's Case

On the evening of February 7, 1999, Richmond Police Officer Debra Noonen was patrolling the "economically challenged" residential area of 4th and MacDonald in central Richmond. The area included a park which was commonly the scene of drug use and gambling.

A few minutes before 9:00 p.m., Officer Noonen heard "one loud sound" which could have been "some sort of firecracker or a gunshot." After a "break" of a "couple [of] seconds," she heard three consecutive gunshots. Three women directed her to the 200 block of 4th Street, where she found Paul Cook lying in the gutter between a parked car and the sidewalk near 235 - 4th Street. Cook was bleeding from the head and appeared to be dead.

Only four or five minutes elapsed between Noonen hearing the shots and her discovery of the body. Noonen and other officers sealed off the block where the body was found. After she had been at the crime scene a little over 45 minutes, Noonen heard defendant call out to her, using her first name. Defendant was sitting on the front porch of a duplex at 240/242 - 4th Street. An open can of Budweiser was within his reach. It was the first time Noonen had seen defendant since she arrived at the crime scene.

Defendant told Officer Noonen the dead man was his cousin. This term, in the usage of the neighborhood, could mean a blood relative, friend, or close associate. Defendant clearly was referring to the dead man, who was lying in the gutter across the street from defendant's porch, but probably hidden from his view—presumably by the parked car.

Defendant "wanted to know what was going to happen next with the scene." Noonen noticed he was "tidally [*sic*] groomed" and smelled of soap, as if he had just bathed. He spoke in a "low, calm manner," and was not "visibly upset like a fair number of people generally are when a friend or relative gets killed like that." Defendant never asked Noonen who had been killed right across the street from his house.

Noonen knew defendant and suspected he was the killer—especially after someone on the street said that "Joe did it." Defendant volunteered to Noonen that he

had been gambling at the 4th Street park. She asked him if he knew what had happened in front of his house. He said he did not. He said he had heard the shots while he was in the park gambling, came back to find his street sealed off and his entry refused by police, and went around to 5th Street to climb a fence to get home. But the park was closer to the crime scene than Noonen had been when she heard the shots, and no one was being kept out of the area by police until after Noonen arrived.

Noonen took defendant to the park on the pretext that she wanted him to show her where he had been gambling. In fact, Noonen walked defendant into a prearranged in-field show-up. The eyewitness to the shooting, neighborhood resident Reece Allen, identified defendant as the shooter, and defendant was arrested. Defendant had $1,050 in cash on his person, and was wearing muddy shoes. There was evidence that it was a wet night and defendant could have reached his house by climbing a wood fence behind one of two houses on 5th Street.

The police searched defendant's house and seized 137 individually wrapped packages of marijuana and a quantity of cocaine, $1,177 in cash, a balance beam scale, and boxes of .223 ammunition. The parties stipulated defendant possessed the marijuana for sale.

On the day of the murder, Reece Allen lived in a second floor apartment at 224 - 4th Street. Just before 9:00 p.m. she looked out her front window towards the street, because she heard voices. She thought the voices were coming from the sidewalk a few doors down from her house. She went out on her front porch to get a better view. She saw defendant, whom she recognized as a neighbor who lived down the street. She was sure she saw defendant, whom she had seen "on a regular basis [for] five or six months." She also recognized his voice. Allen positively identified defendant in court.

Defendant was talking with another man Allen did not know. The two men were on the sidewalk a few doors down from Allen's house. They did not sound angry.

Allen went back inside and stayed in her living room. After "[s]ome minutes," perhaps "less than a half hour," she heard a gunshot. Within a "couple [of] seconds" she looked out a small front window. She saw defendant standing a few steps from the back

of a parked car on the opposite side of the street. She saw him walk away from the rear of the car, crossing the street to his house. Defendant looked "like he was hiding a gun up under his coat or something." Allen said she saw defendant stick a brown and black handgun "up under his coat."

After defendant walked away, the other man looked through the parked car. "Maybe about five minutes" later, defendant came back. He stood near the parked car and fired two or three shots at "the person, or whatever it was that was laying there." The parked car was between Allen and defendant, partially blocking her view, but she saw defendant "holding a gun down, and . . . could see and hear the gunfire." While Allen could see defendant, she could not see what he was shooting at. She didn't know until later that it was a person.

The second man stood about four feet from defendant while he fired. Defendant then went back across the street in the direction of his house. Allen lost sight of him for a few minutes, then saw him, his girlfriend, and the second man walk past her house. Someone came out into the street and started "yelling that it was a body" behind the parked car.

Allen testified that she was "positive" defendant was the shooter. When the police arrived she told them what she had seen. They took her in a police car to the park, where she saw defendant and identified him. Defendant had changed his clothes.

A homicide detective who interviewed Allen around midnight on the evening of the murder testified that she did not appear to be impaired by alcohol or drugs. The detective did say that Allen told him the gun was black, not black and brown.

Defense counsel thoroughly cross-examined Allen on her ability to see the scene of the shooting, and on her various statements to police. The cross-examination, which includes the probing of inconsistent statements made at the preliminary hearing, consumes almost 30 pages of reporter's transcript. On redirect, the People established that in every statement concerning the shooting Allen had always identified defendant as the shooter.

The area of the shooting was well lit. Officer Noonen testified that the location of the body was lit by a nearby street light and the porch light of a house across the street. The evidence technician who responded to the scene testified "the area immediately around the victim was well lit. And it was light enough to have a very clear view of the evidence right around the victim." This was because of the street lamp.

The police found expended shell casings and a live .223 round in the street near the body. .223 rounds are used in assault weapons. At least one of the shell casings was described as ".38 super auto," meaning it was fired from .38 super automatic—a gun "extremely rare" in Richmond. The casing was apparently fired from the same gun used in another Richmond homicide.

Paul Cook had been shot four times in the head and neck. The first shot struck Cook in the neck and severed his spinal cord. The second, third and fourth shots struck Cook in the back of the left side of his head. The angles of the wounds are consistent with Cook having been shot while lying on the right side of his face, with the back of the left side of his head facing upwards, and the shooter standing over him. An analysis of the bullet damage to the parked car showed the shots, or at least some of them, had been fired from the rear of the car towards the front.

The Defense Case

In the year between the murder and the trial, Allen received approximately $18,000 in living expenses from the District Attorney's office. This amount included regular payments for rent, utilities, food and incidentals, and moving expenses to enable Allen to live in a nicer apartment in a better neighborhood. But it was not her idea to be relocated.

At the time of the murder, Celia Cruz lived with defendant at 242 - 4th Street. A little after 8:00 p.m. on the evening of the murder, she visited her mother who lived two blocks away. Defendant walked Cruz to her mother's house. Defendant left her there and went back home. A short time later Cruz felt sick and started to walk home. She saw Larry Russell standing next to Cook's parked car. Cook was also there, saying, "I'm sorry. I'm sorry." Russell fired three or four shots at Cook, first when Cook was

standing and then when he had fallen to the ground. In contrast to prosecution witnesses, Cruz said the area around the car was dark, and not all the streetlights were working.

Defendant came out to the street and took Cruz back to her mother's house. According to Cruz, he was upset that Cook had been killed.

On cross-examination, Cruz—who was married to defendant at the time of the trial—denied seeing anyone using drugs in her home around the time of the murder, and denied seeing the seized plate of cocaine. She admitted she had lied to police in a statement she gave at the police station shortly after the shooting. She also admitted that she did not identify Larry Russell as the killer of Paul Cook when she spoke to police, and indeed at no time thereafter—even though defendant, her husband, had been arrested for the murder.[1]

John Wasson, an investigator for the District Attorney's office, testified that he went to 4th and MacDonald on January 5, 2000, to try to contact Larry Russell and talk to him about the Cook killing. Wasson tried to contact Russell because he had spoken to defendant's brother, Reggie Atkinson, on December 30, 1999. During an interview with Wasson, Reggie told him Russell had killed Cook. Reggie reenacted the slaying and depicted Russell standing behind defendant, reaching around him, and shooting Cook in the chest. This was the first time Wasson had learned Russell was implicated in the shooting.[2]

Wasson testified about the interview with Reggie at an Evidence Code section 402 hearing. Wasson was not permitted to testify about the interview, which included hearsay statements of Russell, because trial counsel had not done sufficient diligence to procure Russell as a witness—and thus the court did not find him unavailable. Wasson did testify as follows about his attempt to contact Russell at 4th and MacDonald.

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[1] On rebuttal, the People presented evidence that Cruz had told a police officer that she did not see the Cook killing or hear the shots being fired, and that Allen was falsely accusing defendant of being the shooter.

[2] There is a discrepancy in the record regarding the date of Wasson's interview with Reggie. Other evidence indicates it occurred in late November, not December 30. The discrepancy is not significant.

Wasson and Russell knew each other, and Wasson had spoken to Russell about unrelated matters while Russell had been incarcerated. Russell knew Wasson was a district attorney investigator.

Wasson saw Russell standing on the corner of 4th and MacDonald. The two made eye contact. Russell walked into the front door of a market and out the back. Wasson drove to the back of the market. Russell, looking back at Wasson over his shoulder, walked away. Wasson saw him peeking over a fence and then never saw him again. Wasson drove around looking for Russell to no avail. Presumably, Wasson never spoke to Russell that day.

Reggie Atkinson testified that he and defendant were "like hanging together all day" in the neighborhood on the day of the murder. They drank some beer and shot dice in the park and on the sidewalk near defendant's house. He did not see defendant with a gun. He last saw Cook on that day "just a little bit . . . after it got dark." He had met Cook through his brother and had known Cook for about two weeks. Cook and defendant were friends, and drank together "like old war buddies."

Reggie also saw Larry Russell on the day of the murder. Russell "mostly . . . was . . . standing by Mr. Cook," watching out for police while others shot dice in the park. Cook was "constantly trying" to get "some drugs." His efforts irritated Russell. Defendant told Cook to stop bothering Reggie for drugs. Cook was already under the influence. Reggie last saw Cook and Russell after the dice game broke up, "anywhere from 8:00, I think 8:30, anywhere to like 9:00 probably . . . it was dark."

Reggie admitted on cross-examination that he had never spoken to police about his brother's case until "possibly" November 1999, when he met with Wasson—despite knowing that defendant had been arrested for killing Cook. Reggie also admitted he was a convicted felon.

Defendant initially declined to testify. After the People's rebuttal evidence, the defense reopened to allow defendant's testimony. We summarize that testimony as follows.[3]

Defendant and Cook were friends. Cook was a drug user and bought $30-$40 worth of cocaine from defendant every day. On the day Cook was killed, defendant took care of Cruz, who was sick, all morning. He went to the park at noon and shot dice with several people including Russell and Reggie. Cook came to the park later that day, and kept asking people for drugs. Reggie argued with Cook, possibly about his constant drug use.

Officer Noonen broke up the dice game. Defendant went to 4th Street, in front of his house, with Cook, Russell, Reggie, and others. Defendant sold Allen $17 worth of cocaine, and Allen walked back to her apartment. The group broke up about 8:00 p.m. Defendant walked Cruz to her mother's house, leaving Russell and Cook on the street. Defendant returned to find Russell and Cook arguing. Cook threatened to rob Russell. Defendant tried to get the men to calm down. Russell pulled a gun and charged at Cook. Russell shot at Cook but missed.

Defendant heard Cruz screaming and saw Russell shooting in her direction.[4] Defendant grabbed Cruz. Cook ran around the front of the parked car and Russell ran around the back and cut him off. Cook said "I'm sorry" three times. Russell responded, "[I]t's too late now" and shot Cook in the back of the head. Cook fell and Russell shot him, in defendant's words, "some more."

Defendant walked away with Cruz and then returned to the scene. The street was blocked off, so he walked around the corner and jumped a fence behind his house to get

[3] We state the testimony in straightforward narrative form. The reader of this opinion should understand that given the substantial evidence rule of appellate review, we are bound to view the facts in favor of the People. Expository statements by defendant contrary to the People's evidence should not be quoted out of context or taken as an acceptance on our part of their truth. We simply wish to avoid cluttering this opinion with repeated qualifiers such as "defendant testified that," "according to defendant," and the like.

[4] Cruz's testimony was less than clear on the point, but she seemed to claim she thought Russell was shooting at her.

home. When he spoke to Officer Noonen he was going to tell her what happened, but decided not to when Noonen suggested defendant had killed Cook. He denied going into his house, changing his clothes, or smelling of soap. His knees were muddy from playing dice in the park.

Trial began February 1, 2000. On February 16, 2000, the jury convicted defendant of the murder of Cook. On April 28, 2000, the court then granted trial counsel's motion to withdraw. On February 16, 2001, through new counsel, defendant moved for a new trial. Defendant claimed that newly discovered evidence showed Russell killed Cook, and also argued his trial counsel, Michael Oliver, was ineffective. After a lengthy hearing the trial court denied the motion. The court sentenced defendant to a term of 50 years to life for the murder.[5]

II. DISCUSSION

Defendant's motion for new trial was based on two grounds: newly discovered evidence and ineffectiveness of trial counsel. Defendant contends the trial court erred by denying the motion because (1) newly discovered evidence showed that Cook was killed by Larry Russell; (2) trial counsel Michael Oliver was ineffective for not properly investigating and presenting the evidence of Russell's guilt, including various admissions supposedly made by Russell; and (3) Oliver was ineffective for failing to investigate and present evidence of certain matters which allegedly could have impeached Allen, the eyewitness to the murder. We disagree because the purported evidence of Russell's guilt was not newly discovered or credible, and because defense counsel was not ineffective on the grounds urged by defendant.[6]

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[5] The jury also convicted defendant of possession of marijuana for sale, a conviction not relevant to this appeal. The drug conviction added five years to defendant's sentence, for a total term of 55 years to life.

[6] The issue of ineffective counsel is more appropriately raised by a petition for writ of habeas corpus as defendant's counsel did in this case in a related petition. But since trial counsel testified at the new trial hearing and gave explanations for his challenged conduct as to the issues discussed in this opinion, we have considered them on appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

1. Newly Discovered Evidence

At the hearing on the motion for a new trial, defendant presented the testimony of several witnesses regarding the ground of newly discovered evidence. We summarize that testimony as follows.[7]

A former girlfriend of Russell, Melody Waldon, was with defendant and Russell on 4th Street just before the shooting. Russell was selling drugs and would not take her home. She walked to the neighborhood store. On her way back she heard shots. She did not see the shooting. She went to the motel room she shared with Russell. Russell came back to the room and washed his hands in the bathroom. Waldon saw Russell had burned some clothes in the dumpster. Russell told Waldon he shot Cook because Cook had been "talking crazy or some shit all day." Waldon had seen Russell with a gun that day. Russell had a number of guns. Although she knew defendant had been arrested for the murder, she did not go to the police because she was afraid of Russell. Waldon admitted drug use, but claimed she had not used drugs the night of the shooting.

Aaron Allison was a close family friend of defendant. He was involved in the dice game the day of the killing. Cook came up to the dice players and threatened to rob someone. Defendant told the players Cook was "cool" and "just under the influence right now." Allison did not see Cook begging for drugs. Allison did not witness the shooting. A few days later, Russell told Allison he shot Cook in the head because Cook had argued with defendant. Many months later Russell told Allison he would confess to the police. Because he did not witness the shooting, Allison did not go to the police himself and identify Russell, not defendant, as the killer.

A lifelong friend of defendant, DeShawn Clark, was also involved in the dice game the day Cook was shot. Cook showed an interest in the money being won by some of the players. Clark was on 4th Street, a block from the murder scene, when he heard shots. He ran into defendant, who said to Clark, "I told [Russell] not to do that." Defendant also said Russell had "popped" Cook. Clark soon learned that defendant had been arrested for the killing. At some later point, Clark and Russell were in jail at the

[7] See footnote 3, *ante*.

same time. Russell told Clark to tell defendant that he, Russell, was planning to admit the Cook killing.

Reggie, defendant's brother, played dice with the others in the park the day of the shooting. Defendant, Clark, Russell, and Cook were there. Cook wasn't gambling, but was mostly watching the game. Cook was a friend of his brother's. Cook asked defendant for money and kept asking Reggie for money and drugs. Cook was "high and drunk most likely." Cook's behavior irritated Russell, who had "heated words" with Cook. The game broke up and Reggie went home. Russell met with Reggie the next day and said the night before he had shot someone with a weapon. Russell indicated he had shot the victim in the shoulder area.

Henderson Porter met Russell and defendant while the three were in jail together. While defendant was being tried, Russell told Porter he was going to tell police he killed Cook. Porter heard Russell tell a sheriff's deputy that defendant did not kill Cook.

On February 23, 2000—a week after the jury convicted defendant—Russell made a taped jailhouse confession to police officers that he killed Cook. But after the tape was turned off Russell told one of the officers that "he was just trying to take care of his boy."

Russell took the stand at the new trial hearing and invoked the Fifth Amendment. Then the court admitted into evidence a tape of the jailhouse confession. Neither the tape, nor a transcript of the confession is included in the record on appeal. Defendant represents, without contradiction by the People, that in his confession Russell claimed he shot Cook "one to three times while he was standing or falling to the ground" because Russell thought Cook was reaching for a gun.

Both Reggie and defendant's trial counsel, Michael Oliver, testified that the basic idea that Russell, not defendant, killed Cook was well known at the outset of the case. Indeed, Reggie testified he had repeatedly told Oliver before, during, and after defendant's trial that Russell killed Cook, not defendant. Oliver testified Reggie was "adamant that Mr. Russell was the perpetrator of the homicide . . . ."

The trial court denied the motion for new trial insofar as it was based on newly discovered evidence. The court found that Russell's admission to the killing was not

newly discovered: "The substance of it was known by Mr. Oliver through Reggie Atkinson and the defendant at almost the beginning of his representation." Furthermore, "The so-called substantive confession given a week after the trial, in this court's view, now that I have heard all the evidence, was contrived. [¶] The sequence of events, the manner of killing, and reason for the killing as related by Russell demonstrates clearly that the statement was false." Also, "Russell admitted to Investigator Wasson after the tape was turned off . . . that he was just trying to help his [']boy[']."

The court further found the testimony of defendant's witnesses was "simply not credible." "All were either friends of or related to the defendant and thus had a motive to fabricate evidence." The court also noted that, except for Reggie, none of the witnesses "ever told the police what they knew."

We review the denial of a new trial motion for abuse of discretion. Indeed, a motion for new trial is so entirely within the court's discretion that we cannot disturb its ruling absent the clear appearance of an unmistakable, manifest abuse of that discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).) And each ruling is reviewed on its unique factual background. (*Ibid.*)

Under Penal Code section 1181, subdivision 8, a court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: 1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits. [Citations.]" (*Delgado, supra,* 5 Cal.4th at p. 328 [internal quotation marks omitted].)

And " 'the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial

would render a different result reasonably probable.' [Citation.]" (*Delgado, supra,* 5 Cal.4th at p. 329.)

Here the trial court specifically found that defendant's witnesses were not credible. The court saw and evaluated their demeanor in court. They were all friends or family members of defendant. Except for Reggie, none ever went to the police with their information. In any case, we do not readjudicate witness credibility on appeal.

The court also found that Russell's jailhouse confession was "false" and "contrived." We agree. The confession, made just a few days after defendant was convicted and with the stated motivation of Russell to "take care of his boy," is inconsistent with the physical evidence: Cook was *not* shot one to three times as he was standing or falling, but was shot four times—once in the neck and three times in the back of the head—*as he was lying flat on the ground*. The confession is also inconsistent with Allen's eyewitness testimony. We cannot disturb the trial court's determination that the confession is not credible.

Ultimately, none of defendant's evidence was newly discovered in the sense that its basic premise—that Russell killed Cook and defendant was innocent—was well known to the defense all during trial. And defendant was able to present to the jury his theory that Russell was the killer through his own testimony and that of his wife, Celia Cruz. The jury simply chose to disbelieve this testimony. And even if one regards the evidence itself, not its basic premise, as newly discovered, it is merely cumulative of the defense theory, which was soundly rejected by the jury.

The trial court did not abuse its discretion by denying the motion for new trial insofar as it was based on newly discovered evidence.

2. Ineffective Counsel – Evidence of Russell's Guilt

Defendant contends that Oliver was ineffective for failing to adequately investigate the issue of Russell's responsibility for the shooting, and for failing to serve Russell with a subpoena so he could be found to have been diligent in trying to produce him—thus allowing hearsay testimony of Russell's admissions. More generally,

defendant also argues Oliver suffered from a mental impairment which affected his judgment during trial.

Insofar as the new trial motion concerned his alleged ineffectiveness, Oliver testified at length.

Oliver had practiced law for 32 years. At the time of defendant's trial he was a certified specialist in criminal law. When he took defendant's case it had already been "relatively thoroughly worked up"—preliminary and pretrial matters had been handled by two attorneys, at least one of whom was a public defender. Oliver received all police and lab reports, and probably reports of witness interviews.

Oliver did not hire his own investigator, which is his usual practice, because he felt that "in this particular case, . . . there was going to be a lot of difficulty for an investigator, unless it was one who had some particular connection to the folks in the area." Oliver referred to the fact that police had had little success talking to residents about Russell—as well as the fact the neighborhood "could be somewhat dangerous." So Oliver conducted his own investigation. He visited the scene, talked to several neighborhood residents, observed the park, and took pictures showing Allen's view from her apartment.

Before trial began, Oliver learned that Russell frequented the 4th and MacDonald neighborhood, had an extensive criminal record, and had an outstanding warrant. He had spoken to Reggie, who was "adamant" that Russell was the shooter.[8] Oliver thought it was problematic that Russell would confess to murder or cooperate with law enforcement. Since Russell was represented by a lawyer on another charge, Oliver believed the lawyer would tell Russell not to talk to Oliver or his investigator.

Oliver believed that Russell would not speak openly to a person in legal authority, such as an officer or investigator, but would only speak "in the presence of somebody exerting at least a moral influence upon him . . . through their connection with [defendant] to tell what he knew." Oliver "was told that I could rely that people would

[8] Reggie testified at the hearing that he told defendant's original attorneys, as well as Oliver, that Russell had admitted the shooting.

put me in touch with Mr. Russell and that they would have the moral suasion to obtain his forthright statement about what happened and hopefully enough details about the homicide that would put us in a position to give any credence to the fact that he was the admitted as well as the actual perpetrator." Oliver "was continuously advised that [Reggie] was probably the only candidate as a person who could locate and secure enough cooperation on the part of Mr. Russell to be interviewed." Oliver believed that any discussion with Russell would have to be arranged by Reggie.

Oliver was not sure a third party culpability defense, i.e., a claim that Russell was the shooter, would be believable in this case. Reggie's enactment of Russell's version of the shooting, which Reggie heard from Russell, was virtually impossible and inconsistent with the physical evidence—according to Russell's version, he shot Cook in the *chest*, not the neck and head. If Russell testified to his version, his testimony would not be credible—and indeed would be "disastrous" for the defense. As the trial court found, Oliver believed "this contention that Russell was the shooter was contrived."

Thus, Oliver tried to admit Russell's confession not by his own testimony, but by hearsay statements to Reggie, which could be admitted as declarations against penal interest. As we have noted, Oliver was precluded from doing that when the trial court found Oliver had not been sufficiently diligent to make Russell an available witness. But, as noted, Oliver had valid reasons for not trying to subpoena Russell. For one thing, he did not want to subpoena him to testify without talking to him and knowing the substance of his probable testimony.

Oliver had heard the tape of a 911 call in which the anonymous caller identified Russell as the killer. But he believed there would be problems with authenticating the tape and securing its admission under the hearsay rule. Oliver was also suspicious of the tape because Reggie had known about it before it had been disclosed to the defense by the prosecution. Oliver thought the tape was an attempt to manufacture a defense for defendant.

Oliver testified at the new trial motion in July 2001, almost a year and a half after defendant's trial in February 2000. At the time of his testimony, he was retiring and was

the subject of disciplinary proceedings by the California State Bar for his handling of another case.[9] He had a history of nervous breakdowns: one 12 years before defendant's trial, and one 10 years before, both involving suicide attempts; and one in February 2001, a year after defendant's trial. He had been diagnosed with depression and was taking Zoloft at the time of the trial—but he felt capable, and "in pretty good shape," when he tried defendant's case. Oliver felt the effects of handling defendant's case and other cases in 2000 ultimately accumulated to result in the breakdown of 2001.

Experienced criminal attorney Penelope Cooper, who qualified as a criminal law expert, was of the opinion that Oliver should have investigated Russell's admissions more thoroughly, should have tried harder to produce him, and should have used the tape of the 911 call. She called defendant's trial a "seat [of] the pants affair."

In denying the motion regarding this ineffective counsel claim, the trial court found it was plausible for Oliver not to hire an investigator because the case had been investigated in the pretrial stages, while defendant was represented by the public defender. The court also noted Oliver did his own investigation, and also relied on Reggie, who located witnesses for Oliver to interview.

With regard to the failure to subpoena Russell, the court found it was unlikely that Russell would talk to Oliver since Russell was in custody on another charge and represented by counsel. The court further found that "Mr. Oliver was between a rock and a hard place. He clearly wanted to use third party culpability evidence, but he didn't want all the evidence because he knew it was most likely not true and would not have been believed, in any event, by the jury, because it did not square up with the physical evidence." The court found that Oliver believed "this contention that Russell was the shooter was contrived." He was "extremely skeptical" that the statements attributed to Russell were true, and was aware it was his client and his brother "who first came up with the information that Russell was the shooter."

[9] We have taken judicial notice that Oliver was disbarred in 2002, for misconduct unrelated to defendant's case.

The court noted, "An attorney has an obligation to do all he can to defend his client, but that does not include to knowingly commit . . . perjury." The court found that Oliver "did the best he could to try to get in Russell's statement as a declaration against penal interest. He failed in that attempt. [¶] But given the circumstances faced by Mr. Oliver, I do not believe this failure demonstrates that he failed to act in the manner to be expected of a reasonably competent attorney. Mr. Oliver weighed the conflicting circumstances that faced his client on this issue and proceeded with the one that had the best chance of succeeding."

The test for ineffectiveness of counsel is well known. The defendant "must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Price* (1991) 1 Cal.4th 324, 440; see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*).)

This case focuses on the first, or competence, prong of the test. Defendant claims that Oliver was not acting in a manner to be expected of a reasonably competent attorney by failing to adequately investigate Russell's culpability and failing to issue a subpoena for his testimony.

We agree that defense counsel has a duty to conduct a reasonable investigation, unless counsel reasonably determines that circumstances make an investigation unnecessary. (See *Strickland, supra,* 466 U.S. at p. 691.) But here Oliver did investigate the case, albeit by himself, and was able to rely on previous investigation by the public defender. Oliver's investigation determined that the issue of Russell shooting Cook was, in Oliver's view, not a helpful one for the defense of his client. As the record and the detailed findings of the trial court show, Oliver had every reason to believe the claim that Russell shot Cook was false, and was put forward by defendant and his brother Reggie. The claim was inconsistent with the physical evidence and inconsistent with the testimony of eyewitness Allen. Indeed, Russell's claim of culpability would be "disastrous" for Oliver's defense of his client.

Oliver was understandably loath to produce Russell and have him give perjured testimony. As the trial court found, Oliver felt the best he could do was try to get Russell's hearsay statements in by a finding of unavailability. He did not succeed, but that does not sink to the level of incompetence. As the trial court noted, Oliver was caught between a rock and a hard place. The evidence presented at the hearing supports the court's finding that Oliver performed with reasonable competence in the face of daunting circumstances.

As a subissue of Oliver's handling of the evidence of Russell's guilt, defendant contends that Oliver was ineffective or suffered a mental impairment during the trial. The trial judge, who sat through the entire trial, specifically found that Oliver was not impaired.

The trial court did not err by denying the motion for new trial on the question of the evidence of the guilt of Larry Russell.

3. Ineffective Counsel—Impeachment of Reece Allen

Defendant contends that Oliver was ineffective for failing to adequately investigate and to present evidence of various matters that would have impeached Allen. Defendant claims that evidence of Allen's drug use, lack of credibility, and inconsistent statements would have effectively impeached her in the eyes of the jury.

We need not summarize defendant's evidence on this point at length. Allen testified she had previously used drugs, but had stopped six years before the hearing. She denied using drugs at a hotel where she stayed after being relocated by police. Defendant presented a witness who claimed he saw Allen smoke crack cocaine at the hotel. This witness also claimed he saw a police officer bring money to Allen's room while the witness was present—but this witness was himself impeached by police testimony that the visiting officer would have noted in the file any visitor to Allen's room, but made no such note.

Defendant presented witnesses who claimed Allen testified against defendant to get back at him; continues to use crack and is a liar; and exchanged sex for drugs and bought drugs from defendant. He also presented the testimony of a police officer that

Allen had told him at the scene of the shooting that she heard three to four shots, but did not see the actual shooting.

Penelope Cooper testified that Oliver should have been more vigorous in his cross-examination of Allen, that Oliver's use of preliminary hearing transcripts was inadequate impeachment, and that Oliver should have hired an investigator to probe Allen's character.

Oliver testified that his "primary thrust in dealing with" Allen "was to impeach her testimony based on her financial interest" in the case. He "invested a considerable amount of effort" to obtain the records of "the secret money that was being paid to house her." He learned that Allen had no criminal record in the Richmond area. He spoke to Reggie and another person in the neighborhood about Allen.[10] He spoke to defendant's prior counsel about Allen's performance at the preliminary hearing, tried to determine if she could actually see what she claimed to see, and tried to find out if she was ill-disposed toward defendant. He decided not to try to attack Allen as a person of bad character, and felt that forceful cross-examination of Allen would not be effective because she had been a good witness at the preliminary hearing.

In denying the new trial motion on this issue, the trial court found defendant's witnesses who testified to Allen's drug use could not be believed: "To state that these witnesses were less than credible would be charitable."[11] The court further found Oliver was not unprepared for Allen's cross-examination: "To the contrary, Mr. Oliver had a game plan. His biggest target against Ms. Allen was that she was a paid informant. That because of that fact, she could not be believed." In addition, Oliver tried to show that Allen was mistaken about what she saw or "couldn't see what she claimed to have seen." The court also found that Allen "was a terrific witness" who "came across as highly believable."

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[10] He agreed it might have been helpful to hire a private investigator to go into the neighborhood to talk to people about Allen, but said "it was not a neighborhood where people stood in the street and shared opinions about each other's activities."

[11] The court found that one witness appeared to be under the influence of drugs when she testified at the hearing, and "her lies were painfully obvious."

While noting "great respect for Ms. Cooper," the court disagreed that her differences over trial strategy with Oliver rendered him incompetent. "[H]aving reviewed the entire trial testimony, the motions in limine, the testimony and exhibits adduced at this hearing, I am satisfied that Mr. Oliver conducted himself as a reasonable, competent attorney in this case."

Under the test for ineffective counsel set forth above, the trial court's ruling is correct. Oliver conducted a reasonable investigation of Allen and her demeanor as a witness. He knew her testimony was consistent with the physical evidence. He knew of no reason for her to be lying except possibly of being so motivated by the financial assistance she received from the People. Oliver used this as his primary method of trying to cast doubt on Allen's testimony. He worked hard to impeach her, but was not able to—because, as it appears from the record before us, she was telling the truth.

The trial court did not abuse its discretion or err by denying the motion for new trial on the adequacy of the impeachment of Reece Allen.

III. DISPOSITION

The judgment of conviction is affirmed.[12]

_____
Marchiano, P.J.

We concur:

_____
Swager, J.

_____
Margulies, J.

[12] By separate order filed this date, the petition in *In re Joseph Atkinson on Habeas Corpus*, A108861, is denied.